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In The

Supreme Court of the United States

October Term, 1993

KAMEHAMEHA SCHOOLS/BISHOP ESTATE,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF CHRISTIAN LEGAL SOCIETY, CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, CHRISTIAN COLLEGE COALITION, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EPISCOPAL CHURCH IN HAWAII, NATIONAL ASSOCIATION OF EVANGELICALS AND UNIVERSITY OF NOTRE DAME, AND VALPARAISO UNIVERSITY, *AMICI CURIAE*, IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

Whether schools and other institutions that attempt to link religion and culture can preserve their distinctive religious mission without being free to make employment decisions based on the exercise of a religious preference.

Whether the narrow judicial construction placed on an exemption that Congress gave to religious organizations frustrates the Congressional purpose, is at odds with the clear precedents of this Court on religious autonomy and presents an apparent conflict with other courts of appeals.

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INTERESTS OF *AMICI*

Amici are religious organizations and religious colleges that would be affected adversely by the judgment in this case if it were applied to them. *Amici* also include civil rights organizations dedicated to the advocacy of strong protection for the first of our civil liberties, religious freedom. The particular statements of interests are attached in the Appendix. The written consents of the

parties to the filing of this brief have been filed with the Court Clerk.

REASONS FOR GRANTING THE WRIT

I. Schools and other educational organizations committed to a religious mission cannot preserve that mission without being free to make employment decisions based on religious preference.

If ever there was a case that has consequences far beyond the specific facts in the immediate record before the Court, this is the case. The green light signal that the court of appeals has given to the EEOC to impose a rigid rule on religiously committed schools and other means of communication will have a severe impact on literally thousands of religious institutions throughout the nation. All of these institutions stand to lose a large measure of their control over their own hiring policies unless this Court grants the writ and reverses the judgment below.

We offer here (Parts I B and C, *infra*) only a small sampling of the kinds of institutions (schools and journals) that would be adversely affected by the national enforcement of Title VII by the EEOC along the lines indicated in the opinion of the court of appeals.

A. The narrow rule of construction adopted by the Court of Appeals would disqualify much of the religious educational community.

The court of appeals has proposed a rigid and unworkable standard for determining whether an institution is exempt under § 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a). The characteristics of an institution that the court of appeals scrutinized in this case included the "ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools." Pet. App. 6a. It should be noted that

these characteristics are not found in § 702 or anywhere else in Title VII. They are, instead, code words for judicial nullification of a statutory exemption that Congress expressly gave to religious educational institutions.

This list of judicially crafted criteria might seem relatively innocuous at first glance, but the application of these criteria to the facts of this case sends shivers up our collective spine. For example, the court of appeals attached primary and seemingly fatal significance to the fact that the petitioner schools have never been owned, supported, controlled, or managed by any particular religious denomination. Pet. App. 7a-8a.[1] Of the thousands of religious schools in this country, many are in fact owned or operated by a particular church or a faith community. But others have varying degrees of affiliations linking them loosely or closely to a particular church. Thus many of the colleges in our sample below describe themselves as either "nondenominational" or "interdenominational." But these facts should not control whether these institutions may take into account the religious convictions (or lack of them) of their teachers. In enacting § 702, Congress surely did not intend to stifle the ability of the thousands of independent, self-supporting religious schools and colleges to undertake their educational mission with a distinctively religious flavor.

Despite findings of fact about the bona fide efforts of the petitioner to organize a religious curriculum in its schools, Pet. App. 34a-38a, the court of appeals also announced that it would determine whether a curriculum is truly religious or merely ethical, and whether secular courses in the curriculum are taught from a "religious" or a "secular perspective." Pet. App. 10a-12a. As we suggest

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[1] This criterion derives not from § 702, but from another provision not at issue in this case, § 703(e)(2).

in Part II, this is the very sort of intrusive line-drawing that this Court has sought to avoid.

The court of appeals also implied that in order to qualify for the § 702 exemption, a school *must* discriminate on the basis of religion in its student admissions policy. Pet. App. 9a. This bizarre criterion alone would disqualify most of the inner-city parochial schools operated by the Catholic Church, which provide a quality education to minority children of all faiths. Many other religious communities view their educational mission as more extensive than preaching to the choir.

Perhaps the chief difficulty with the parsimonious approach of the court of appeals is that it undercuts the value of religious exemptions at the very moment when they are most needed. This Court has recently taught that religious organizations should, for the most part, turn to the political branches for legislation providing exemptions from a generally applicable norm, on the view that courts are not necessarily bound to supply one under the Free Exercise provision of the First Amendment. *Employment Division v. Smith*, 494 U.S. 872 (1990). *Amici* have on various occasions expressed their doubt as to the reliability of political institutions to preserve religious freedom. Here the Congress has acted to protect religious autonomy, but it has been subverted by judicial construction. This Court has never taught – in *Smith* or elsewhere – that when the political branches have, in fact, acted to provide an exemption to religious bodies, the statutory exemption should be given so ungenerous and confining an interpretation as that adopted here by the court of appeals. In fact, this interpretation is clearly contrary both to the logic of the *Smith* case and to the precedents of this Court deferring to legislative determinations of exemptions. *See, e.g., Bd. of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) and *Corporation of*

Presiding Bishop v. Amos, 487 U.S. 237 (1987) (adopting broad construction of the very exemption at issue here).

The only sort of institution that would qualify for exemption under the narrow standard constructed by the court of appeals would be a school that is owned outright by a church, that is strongly affiliated with a church in the sense of being operated by that church, that expresses its educational mission solely in overtly religious terms, that limits faculty and students to devout members of the sponsoring church, and that requires participation in chapel services among student activities.

There are several problems with this hypothetical school. Perhaps its worst feature is that it is so wildly hypothetical, in the sense that it is simply nondescriptive of the actual arrangements at religious schools anywhere in America. Certainly with respect to postsecondary education, *Amici* are unaware of *any* college or university in America that meets all of the criteria announced by the court of appeals. When a chemist gets a batch of litmus paper that *always* identifies a solution as basic, even when some of the samples tested are powerful acids, the chemist usually knows that the litmus paper is not much of a test. Similarly, when a court-announced rule has the effect of skewing results in one direction, it is time for this Court to consider whether that rule is the right one.

In another context this Court has taught that under some circumstances government may withdraw benefits from religious schools if their interpretations of Scripture conflict with overriding public policy concerns. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (denying tax-exempt status to school with student discipline policy proscribing interracial dating or marriage).[2] If the rule

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[2] Perhaps this Court may limit its teaching in *Bob Jones University* to racial discrimination. But serious commentators

announced by the court of appeals were correct, religious schools would be put in a double bind. As in *Bob Jones*, they could find their religion at odds with public policy and so must depart from religious practices or beliefs to maintain a government benefit. Alternatively, as in this case, if they are not sufficiently vigorous in asserting their distinctive religious identity in virtually every aspect of their educational mission, institutional policies, and curriculum, they stand to lose their ability to take religious convictions into account when they hire and fire their employees. Either way religious schools lose. When religious schools lose their distinctive character as a result of this governmental squeeze play, we all lose. Real diversity is not preserved by governmentally imposed uniformity. *Id.* at 609-10 (Powell, J., concurring in part).

B. The diversity of relationships between religious organizations and schools with a religious mission requires a broad construction of the exemption.

Quoting its earlier decision in *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988), the court of appeals concluded that "only those institutions with *extremely close ties to organized religion* would be covered." Pet. App. 5a (emphasis added). This criterion is flawed for three reasons. First, this Court has held squarely that

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have suggested, for example, that the Roman Catholic Church should lose its exempt status because its policy of ordaining only men as priests is at odds with the generally applicable proscription of employment discrimination on the basis of gender. *See* Mary Becker, The Politics of Women's Wrongs and the Bill of "Rights," 59 *U. Chi. L. Rev.* 453, 484-87 (1991); and Judith Miles, Beyond *Bob Jones*: Toward the Elimination of Government Subsidy of Discrimination by Religious Institutions, 8 *Harv. Women's L.J.* 31 (1985).

a claim for protection under the Free Exercise provision of the Religion Clause will not fail even though the claimant is not a member of any particular religious denomination. *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989). Since that is true for constitutional claims, it should likewise be true of claims arising under a statute that Congress enacted to extend an exemption to religious organizations for constitutional reasons. Second, the criterion implicitly involves the judiciary in a subtle preference for the sort of religion (hierarchical organizations) that are more likely to require "extremely close ties" between the church and an affiliated school. This violates the principle announced in *Larson v. Valente*, 456 U.S. 228 (1982), that government may not discriminate among religions. Third, the criterion requires too many religious organizations either to lay down on a Procrustean bed or else surrender the rights that Congress secured for them in § 702. To illustrate this third point, we offer now some actual examples of square pegs of differing size that cannot be jammed into the one round hole designed by the court of appeals.

Notre Dame University in South Bend, Indiana, is renowned nationally as a leading Catholic university. Like the vast majority of Catholic colleges and universities,[3] it is not owned, controlled or operated by the local

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[3] Of the approximately 220 Catholic colleges and universities in the United States, only 7 schools, 6 of which are seminaries, grant pontifical degrees, which entail a greater degree of control from the Vatican. Only 12 have any formal legal relationship to the local Diocese. The remaining 201 Catholic institutions of higher education were founded by a religious order and are typically governed by a self-perpetuating Board of Directors. Source: Association of Catholic Colleges and Universities.

Catholic Diocese of South Bend-Fort Wayne. It was founded in 1842 by the Congregation of the Holy Cross, and is now governed by an independent Board of Trustees, on which members of the Holy Cross Fathers retain a decisive vote. It aspires both to excellence as a leading research university and to maintain the Catholic character of the institution. *See, e.g.*, Edward McGlynn Gaffney and Philip R. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* 41-42 (1982) (statements of hiring policies by two Provosts at Notre Dame).

Colorado Christian University in Lakewood, Colorado, "emphasizes the integration of biblical principles into every aspect of the student's life." *Choose a Christian College* 27 (1992). It maintains a policy of mandatory attendance at chapel services by students and describes its goal as "preparing each student for a successful life of leadership and service." *Id.* It is not owned or operated by any particular religious organization, but describes itself as "interdenominational."

Gordon College in Wenham, Massachusetts is a Christian liberal arts college with a policy of mandatory chapel services. *New York Times* education editor Edward Fiske described it as a "major intellectual bastion of Protestant evangelicalism." *Choose a Christian College* 39 (1992). It is not owned or operated by any particular religious organization, but describes itself as "interdenominational."

John Brown University in Siloam Springs, Arkansas, maintains a policy of mandatory chapel attendance and promotes itself as follows: "With 120 international students and 80 Third World culture missionary's kids, JBU offers a global approach to Christian higher education right in northwest Arkansas." *Choose a Christian College* 48 (1992). It is "nondenominational."

Northwestern College in St. Paul, Minnesota, is the only nondenominational Christian liberal arts college in Minnesota. It requires chapel attendance and 45 credits of Bible-related courses. *Choose a Christian College* 67 (1992).

Taylor University in Upland, Indiana, maintains a policy of mandatory chapel three times per week. *Choose a Christian College* 83 (1992). Its academic program emphasizes "leadership development [and] a solid biblical foundation." Founded by Methodists in 1846, it no longer is controlled by the United Methodist Church and describes itself as "interdenominational."

Valparaiso University in Valparaiso, Indiana, is a nationally prominent Lutheran university. Although participation in chapel services is not mandatory, hundreds of the students and faculty members take part in these services each day during the school year. The university does not seek to have either a faculty or a student body that is composed exclusively of Lutherans, or even of a majority of Lutherans, but it strives to maintain its Lutheran character and reserves the right to take the religious convictions of employees into account in the hiring process. The university is operated by a lay Board of Directors, and is not owned or controlled by either of the two major Lutheran groups in America, the Lutheran Church-Missouri Synod or the Evangelical Lutheran Church in America.

Westmont College in Santa Barbara, California, defines its mission as providing "a program uncompromised in its commitment to a high-quality liberal arts education and integrated with enthusiastic, evangelical Christian faith." *Choose a Christian College* 91 (1992). It maintains a policy of mandatory chapel attendance, and describes itself as "nondenominational."

Wheaton College in Wheaton, Illinois is one of the country's best known evangelical colleges. Convinced

that "all truth is God's truth," it actively pursues the integration of Biblical Christianity with rigorous academic study in the liberal arts, with the goal of "serving Christ in this world." *Choose a Christian College* 92 (1992). It maintains a policy of mandatory chapel attendance, and describes itself as "nondenominational."

Under the rule of construction adopted by the court of appeals, *none* of these independent colleges and universities would be free to attempt to preserve a distinctive religious flavor as they engage in higher education.

Some of the Hebrew day-schools found in approximately forty states are attached in a formal legal manner to a synagogue. Most are not. Under the rule of construction adopted by the court of appeals, most of these yeshivas would not be free to preserve a distinctively Jewish atmosphere and ethos by maintaining an employment policy that prefers Jews over Gentiles.

C. The diversity of relationships between religious organizations and journals with a religious mission requires a broad construction of the exemption.

Religious traditions are not transmitted exclusively in the setting of a formal school. For example, many journals and periodicals in this country explore in a variety of ways the connections and relationships between religion and many aspects of modern life. *Amici* offer some examples of these publications, none of which is owned or controlled by any particular religious denomination, but each of which needs to have some flexibility in hiring its personnel in order to achieve its own mission.

America is a weekly journal of opinion edited by members of the Society of Jesus (Jesuits). It is not owned or operated by the Roman Catholic Archdiocese of New York.

The Christian Century is "an ecumenical weekly publishing articles by the most respected theologians, historians and church leaders," with a strong emphasis on the relationship of religion to social and political issues. It is edited by lay Protestants and is not owned or operated by any particular religious denomination.

Commentary is a monthly journal of opinion published by the American Jewish Committee. In sponsoring *Commentary*, the AJC does not purport to speak for Judaism in any, let alone all, of its branches, but aims to meet the need for a journal of significant thought and opinion on Jewish affairs and contemporary issues. The journal is not owned or operated by any synagogue or by any council of Rabbis or congregations.

Commonweal is a weekly journal of opinion edited by lay Catholics. It is not owned or operated by the Roman Catholic Archdiocese of New York.

First Things is a monthly journal of opinion exploring the connection between religion and public life. The editor in chief, Rev. Richard John Neuhaus, is a Roman Catholic priest; the editor, Dr. James Nuechterlein, is a Lutheran layman. It is not owned or operated either by Catholic or by Lutheran authorities, but by an independent publisher known as the Institute on Religion and Public Life.

The *Journal of Law and Religion* is a biannual publication of the Council on Religion and Law and Hamline University School of Law. The journal is not owned or operated by any religious denomination. Its editorial board is composed of Jewish, Catholic, Protestant, and Muslim scholars.

The *National Catholic Reporter* is a weekly newspaper of national circulation published since 1964 by lay Catholics in Kansas City, Missouri. It is not owned or operated by the Roman Catholic Diocese of Kansas City, a fact that has sometimes been lamented by Catholic bishops who regret the "liberal" tendencies of this newspaper.

Tikkun is a bimonthly Jewish critique of politics, culture, and society. Although many of the articles in this journal are not expressly theological, nearly all of them are susceptible to the characteristic Jewish perspective that religion pervades life. The journal is not owned or operated by any synagogue or by any council of Rabbis or congregations.

The *Wanderer* is a weekly newspaper of national circulation published since 1867 by lay Catholics in St. Paul, Minnesota. It is not owned or operated by the Roman Catholic Archdiocese of St. Paul-Minneapolis, a fact that has sometimes been lamented by Catholic bishops who regret the "conservative" tendencies of this newspaper.

Under the rule of construction adopted by the court of appeals, *none* of these religious journals or newspapers would, as a practical matter, be free to attempt by hiring policies to preserve a distinctive religious viewpoint as they engage in the effort to shape the culture through their dissemination of ideas.

We doubt that the EEOC would ever consider enforcing Title VII's ban on religious discrimination in employment against secular counterparts of these journals by requiring one of them to hire a religious believer. The net effect of this bias is an ideological tilt toward secularism that would leave secular journals free to discriminate against religious believers if they so chose, but would cripple religious journals by insisting that they hire people who are not sympathetic to their religious mission. This effect is clearly at odds with the teaching of this Court that secular speech may not be preferred over religious speech. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

II. When the Congress has refrained from regulating religious organizations by providing an exemption, the lower courts should not unduly narrow the scope of the exemption by a canon of construction that contradicts the Congressional mandate.

This Court has already addressed the statute at issue in this case. In *Corporation of Presiding Bishop v. Amos*, 487 U.S. 327 (1987), the Court turned back an Establishment Clause challenge to the validity of the exemption for religious discrimination by religious associations in Section 702 of Title VII of the Civil Rights Act of 1964. In the course of explaining why this provision is sound under settled First Amendment principles, the Court rightly deferred to the judgment of Congress that this exemption was consonant with the high regard for religious freedom that is central to our heritage.

The court of appeals not only ignored this Court's construction of § 702 in *Amos*[4]; it also ignored the approach of reading a statute to avoid constitutional difficulties, as suggested by this Court in *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

A. The narrow construction of the religious exemptions in Title VII severely threatens the ability of religious schools to make religiously-informed decisions to maintain their *bona fide* religious traditions.

One reason to grant the writ is that the decision of the court of appeals to narrowly construe and apply § 702

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[4] Remarkably, *Amos* is not even cited, let alone discussed, in the opinion of the court of appeals, Pet. App. 1a-19a, in the opinion of the district court, Pet. App. 20a-43a, or in the EEOC's determination, Pet. App. 44a-54a.

departs significantly from the teaching of this Court about the autonomy of religious bodies that arises as a *free exercise* concern. The burden imposed on religious bodies by the operation of the wooden rule of construction announced by the court of appeals would not typically arise out of a conflict of religious conscience vis-a-vis a general command of the government. Rather, the problem lies in the severe erosion of the *autonomy* of religious bodies in determining their own policies, articulating their own voices, and pursuing their own paths free from needless governmental intervention in their affairs.

Catholic Bishop of Chicago, supra, illustrates this sort of concern. The right of workers to organize and bargain collectively with employers has been a central feature of Roman Catholic social teaching for over a century. Hence, the problem with the government's assertion of jurisdiction over the Catholic schools in that case was not that Catholics are conscientiously opposed to collective bargaining, but that they need the freedom to operate their schools in the way they see fit without undue outside interference, whether from the government or third parties like a union. *See* Douglas Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 *Colum. L. Rev.* 1373 (1981).

The interference here with the ability of religious schools to carry on their mission as they see fit is not trivial. The right to hire faculty with religious background and convictions is crucial to the educational mission of a religious school. Indeed, this right defines that mission in practical terms, for the loftiest statement of purpose will remain an empty formula unless it is implemented by personnel committed to the promotion of the religious mission of the school. *See* Gaffney and Moots,

Government and Campus, 32-44 (1982) (offering rationale for religious preference in hiring at religious schools). Accordingly, the *Amos* court recognized in § 702 "a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. 327, 335 (1987); *and see* at 348-349 (O'Connor, J., concurring) (1987).

By constricting the reach of the religious exemption that Congress extended to religious institutions in § 702, the court of appeals would impose a significant burden on the right of these religious institutions to pursue their mission with people committed to that mission. As we illustrate above (Part I B) with examples from around the country, the resulting injury to religious schools would be severe.

B. The narrow reading of the religious exemptions in Title VII imposed by the court of appeals would excessively entangle the government in religious matters.

A second reason to grant the writ is that the decision of the court of appeals departs significantly from the rationale for religious autonomy articulated by this Court in *Amos* as a *non-establishment* concern. Mainly in the school aid cases, the Court has worried whether federal or State financial assistance to religious schools would entail excessive monitoring and surveillance of these institutions, resulting in excessive entanglement between the government and religion in violation of the Establishment provision of the Religion Clause. The mere possibility that this *might* occur, even where there is no evidence for decades that it has *actually* occurred, apparently suffices to invalidate a program. *See, e.g., Aguilar v.*

Felton, 473 U.S. 402, 413 (1985); *Lemon v. Kurtzman*, 403 U.S. 602, 613-614 (1971).

The court of appeals would permit a school to be covered under the statutory exemption only if a federal judge – or much more likely, a federal employee of the EEOC[5] – determines that the institution is "primarily religious." Pet. App. 5a, citing *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618-619 (9th Cir. 1988). But forcing the distinction between the "primarily religious" and the "primarily secular" is the very sort of inquiry that Congress sought to avoid in enacting § 702. There is nothing secular but secular thinking makes it so. And there is nothing religious but religious interpretation makes it so. Hence the test that the Ninth Circuit – and no other federal court of appeals – has adopted is by no means a facile distinction. On the contrary, under the clear teaching of this Court in *Amos*, 483 U.S. at 336, it is itself problematical.

A pernicious effect of the rule announced by the court of appeals is that it would enable judges or governmental officials in the EEOC to impose their own values about religion and secularity, or about the "right" blend in the relation between religion and secularity, upon religious institutions that the Congress has, to date, left free from regulation.

On the one hand, individual judges or EEOC officials might engage in the exercise of dividing the "primarily

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[5] Not all religious institutions may be assumed to have the resources to litigate every threat to their autonomy, any more than every newspaper may be assumed to have the resources to fight every threat of a libel action. The potentially deleterious effect on religious freedom that is latent within the Ninth Circuit's standard is just as real as the chilling effect that this Court has recognized in the free press area. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964).

religious" from the "primarily secular" out of a motivation to encourage religious bodies to be more authentically religious. These judges and officials would certainly be free to voice this concern as members of those religious bodies. But under our constitutional order, it is plainly not their duty to impose their views of what is "truly" religious on the religious communions themselves. As Chief Justice Burger wrote in *Thomas v. Review Board*, 450 U.S. 707 (1981):

> "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . . Courts are not arbiters of scriptural interpretation."

Id. at 714, 716. *See also Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (renouncing "departure from doctrine" standard for resolution of intragroup religious disputes); *Watson v. Jones*, 13 Wall. 679 (1872).

On the other hand, it is also possible that judges or EEOC officials might embark upon their mission of dividing the world of religious institutions into those which are "primarily religious" and those which are "primarily secular" with the goal of sanitizing them of politically incorrect religious distinctives. But the result would be equally unconstitutional: religious institutions would be forced to abandon a religious right, namely, to exercise a religious preference in employment decisions. Congress

did not manifest any such intent. The subtle but ineluctable effect of the lower court's narrow interpretation of § 702 is to diminish religious influence in society by requiring religious institutions, through their hiring practices, to become over time more "secular" than the law now requires them to be. This patently advances a form of secularism through judicial engineering that is hostile to any significant role for religion in our culture. The fact that this potential effect of the ruling below is itself at odds with the clear and repeated teaching of this Court that the government may no more *inhibit* religion than it may advance it, *see, e.g.*, Edward McGlynn Gaffney, Hostility to Religion, American Style, 42 *DePaul L. Rev.* 263, 266, n. 21 (1992) (citing cases), constitutes an independent ground for the Court to grant the writ.

C. The narrow reading of the religious exemptions in Title VII imposed by the court of appeals is clearly at odds with the canon of construction adopted by every other court of appeals.

Another reason to grant the writ is that the decision of the court of appeals conflicts with the canon of construction of Title VII adopted by every other court of appeals that has explored this matter. *See Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) ("with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the [§ 702] exemption broadly"), and *EEOC v. Mississippi College*, 626 F.2d 477, 487 (5th Cir. 1980) ("the exemption granted to religious institutions by § 702 . . . must be construed broadly to exclude . . . any employment decision made by a religious institution on the basis of religious discrimination"). *See* Pet. 12-15.

To leave intact the reasoning of the court of appeals would not simply erode the protection that Congress

gave to religious organizations and their schools throughout the vast territory of the Ninth Circuit. It would send exactly the wrong signal to the predominantly secular employees of the EEOC that the hunting season has opened for diminishing genuine religious pluralism throughout the country and substituting an ersatz form of "diversity" on institutions that the government should leave alone.

CONCLUSION

Neither diversity nor religious liberty is preserved by governmentally imposed uniformity. The Constitution and Congress' intent should not be so easily subverted by the Ninth Circuit. For the reasons stated above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The Christian Legal Society, founded in 1961, is a nationwide nonprofit professional association of 4,800 Christian attorneys, judges, law students and law professors. Since 1975, the Society's legal advocacy and information arm, the Center For Law And Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the autonomy of religious institutions in employment and other religiously-informed means of advancing their mission.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident" truth that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty.

The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Indeed, the Declaration states that

citizens have a duty to rebel and establish a new government if this right (or any other inalienable right) is abridged by the state. Hence, the unequivocal and nonnegotiable prohibition attached to this, our First Freedom: "Congress shall make **no** law . . . "

The Catholic League For Religious And Civil Rights is a civil rights organization which is national in membership and was organized to combat all forms of religious prejudice and discrimination. The League supports the religious freedom rights of Catholics and others through a wide range of activities. In pursuit of these interests, the League has filed amicus briefs with this Court urging expansive protection of religious freedom in employment. The League believes it is essential for religious educational institutions to enjoy the freedom to hire employees who share their religious traditions and beliefs free of governmental interference, so that the distinctive educational mission of such institutions can be preserved.

The Christian College Coalition is an association of 85 accredited and independent private colleges and universities of the arts and sciences. Some are nationally and regionally recognized institutions of higher education. Its member schools represent more than 30 denominational affiliations. Thirteen of its colleges are interdenominational or nondenominational in character and by religious commitment. The Coalition requires each member school to provide a traditional liberal arts program with a clear statement of Christian mission. Each member school must exercise a religious preference in employment decisions.

Christian Life Commission of the Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.2 million members in over 38,200 autonomous local churches. The Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.

The Episcopal Church In Hawaii was founded in 1862 by King Kamehameha IV and Queen Emma. It has approximately 7,000 parishioners in 41 parishes and missions. The church maintains parochial and diocesan schools, day care centers and shelters for the homeless. The Church views its ability to remain autonomous in hiring and retaining lay employees to be essential to its mission. To do so, it and other religious organizations must remain free from unnecessary governmental interference in its internal affairs.

The National Association of Evangelicals is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The University of Notre Dame University in South Bend, Indiana, is renowned nationally as a leading Catholic university. It is not owned, controlled or operated by the local Catholic Diocese of South Bend-Fort Wayne. It was founded in 1842 by the Congregation of the Holy Cross, and is now governed by an independent Board of Trustees, on which members of the Holy Cross Fathers retain a decisive vote. It aspires both to excellence as a leading research university and to maintain the Catholic character of the institution.

Valparaiso University in Valparaiso, Indiana, is renowned nationally as a leading Lutheran university. The University is operated by a lay Board of Directors, and is not owned or controlled by either of the two major Lutheran groups in America, the Lutheran Church-Missouri Synod or the Evangelical Lutheran Church in America. Founded in 1859 as an independent university, Valparaiso University was purchased in 1925 by The Lutheran University Association, an independent group of lay Lutherans. It aspires to excellence as a comprehensive university, and it strives to maintain its Lutheran character by taking the religious convictions of employees into account in the hiring process when it deems that appropriate. The by-laws of the University require that 75% of the members of the Board of Directors must be communicant members of a Lutheran congregation.